

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

HAROLD CORDOVA,

Petitioner,

v.

ISIDRO BACA, et al.,

Respondents.

Case No. 3:19-cv-00388-MMD-CLB

ORDER

**I. SUMMARY**

This is a habeas corpus action under 28 U.S.C. § 2254. Currently before the Court is Respondents' motion to dismiss. (ECF No. 26).<sup>1</sup> The Court finds that Petitioner Harold Cordova has exhausted his state-court remedies for Ground 2 of the amended petition (ECF No. 13). Petitioner acknowledges that he has not exhausted Ground 3 but argues that it would be procedurally barred in the state courts without excuse. The Court defers determination of whether Petitioner can excuse the procedural default of Ground 3 to the answer and reply.

Also before the Court is Petitioner's motion for leave to file exhibit under seal (ECF No. 38). The Court grants this motion.

**II. BACKGROUND**

The State of Nevada charged Petitioner with open murder with the use of a deadly weapon. (ECF No. 27-2.) Pursuant to a plea agreement, Petitioner pleaded *nolo contendere* to second-degree murder with the use of a deadly weapon. (ECF No. 14-2.) The state district court convicted Petitioner accordingly. (ECF No. 14-3.) Petitioner did not directly appeal the judgment of conviction.

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<sup>1</sup>Petitioner filed an opposition (ECF No. 35), and Respondents filed a reply (ECF No. 40).

1 Petitioner filed a post-conviction petition for a writ of habeas corpus in the state  
2 district court. (ECF No. 14-4.) The court appointed counsel, who filed a supplemental  
3 petition. (ECF No. 14-5.) The court held an evidentiary hearing on Petitioner's claims.  
4 (ECF No. 14-6.) After the hearing, the court denied the petition. (ECF No. 14-7.) Petitioner  
5 appealed, and he filed an opening brief. (ECF No. 14-9.) The Nevada Supreme Court  
6 affirmed. (ECF No. 14-11.)

7 Petitioner then commenced this action. This Court appointed the Federal Public  
8 Defender, and Petitioner filed a counseled amended petition. (ECF No. 13.)

### 9 **III. LEGAL STANDARD**

10 Before a federal court may consider a petition for a writ of habeas corpus, the  
11 petitioner must exhaust the remedies available in state court. See 28 U.S.C. § 2254(b).  
12 To exhaust a ground for relief, the petitioner must fairly present that ground to the state's  
13 highest court, describing the operative facts and legal theory, and give that court the  
14 opportunity to address and resolve the ground. See *Duncan v. Henry*, 513 U.S. 364, 365  
15 (1995) (*per curiam*); *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

### 16 **IV. DISCUSSION**

#### 17 **A. GROUND 2 IS EXHAUSTED**

18 Ground 2 is a claim that Petitioner received ineffective assistance of counsel during  
19 plea bargaining, resulting in a *nolo contendere* plea that was not knowing and voluntary.<sup>2</sup>  
20 Petitioner alleges that he suffers from post-traumatic stress disorder, and that along with  
21 his medication, made him unable to enter a valid plea. He further alleges that he did not  
22 understand that a plea of *nolo contendere* is the equivalent to a plea of guilty. Regarding  
23 counsel, Petitioner alleges that counsel failed to ensure Petitioner understood the  
24 consequences of the plea and that Petitioner had the ability to enter a knowing and  
25 voluntary plea. Counsel possessed Petitioner's medical records from the Department of  
26 Veterans Affairs and the jail, and Petitioner alleges that those records should have alerted  
27 counsel to the possibility that Petitioner might not have been competent.

28 \_\_\_\_\_  
<sup>2</sup>Ground 1 is the underlying claim that the plea was not knowing and voluntary.

1           The Court disagrees with Respondents that Petitioner did not present this claim to  
 2   the Nevada Supreme Court on appeal from the denial of his post-conviction petition.  
 3   Respondents are correct that Petitioner argued more that counsel failed to communicate  
 4   with Petitioner about possible defenses. (See ECF No. 14-9 at 24-28.) However, in that  
 5   argument Petitioner also argued that he wanted to proceed to trial and that he did not  
 6   understand the differences among pleas of *nolo contendere*, guilty, and not guilty. (*Id.* at  
 7   25-26.). Moreover, the Nevada Supreme Court noted that Petitioner claimed "that trial  
 8   counsel's lack of communication, coupled with his psychiatric issues and medication,  
 9   prevented him from understanding the consequences of his plea or the defenses  
 10   available if he went to trial." (ECF No. 14-11 at 3.) The Nevada Supreme Court then  
 11   analyzed that claim. (*Id.* at 3-4.) Petitioner might not have alleged the claim with as much  
 12   detail as he now does in Ground 2, but he alleged enough for the Nevada Supreme Court  
 13   to understand what his claim was. Ground 2 therefore is exhausted.

## 14           **B.       THE COURT DEFERS RULING ON GROUND 3**

### 15                   **1.       Petitioner did not present Ground 3 to state courts**

16           Ground 3 is a claim that Petitioner's trial counsel had a conflict of interest. Two  
 17   attorneys with the Washoe County Public Defender's office represented Petitioner. The  
 18   public defender's office also represented a jailhouse informant who told police about  
 19   incriminating statements that Petitioner told the informant. Petitioner acknowledges that  
 20   he did not present this claim in his state post-conviction proceedings. (ECF No. 13 at 14.)

### 21                   **2.       Ground 3 is technically exhausted**

22           Petitioner notes that if he returned to state court to exhaust Ground 3, then the  
 23   state courts would find his new post-conviction petition to be untimely under NRS §  
 24   34.726(1) and successive under NRS § 34.810. Both of these statutes allow a court to  
 25   excuse the procedural bars upon a showing of cause and prejudice. Petitioner notes that  
 26   his only argument for cause and prejudice is the ineffective assistance of post-conviction  
 27   counsel. The Nevada Supreme Court does not accept ineffective assistance of post-  
 28   conviction counsel as an excuse to the procedural bars in a case like Petitioner's. See

1 *Brown v. McDaniel*, 331 P.3d 867 (Nev. 2014). Consequently, no available procedure  
 2 remains for Petitioner to raise this claim in the state courts. See 28 U.S.C. § 2254(c).

### 3 **3. Ground 3 is procedurally defaulted**

4 Because the state courts would deny relief based upon state-law reasons that are  
 5 adequate and independent of federal law, Ground 3 is procedurally defaulted. This Court  
 6 cannot consider Ground 3 unless Petitioner can show cause and prejudice.

7 In federal courts the ineffective assistance of post-conviction counsel can be cause  
 8 and prejudice to excuse a procedurally defaulted claim of ineffective assistance of trial  
 9 counsel. See *Martinez v. Ryan*, 566 U.S. 1 (2012). Petitioner makes this argument. (ECF  
 10 No. 35 at 10-16.) Petitioner also asks the Court to defer resolution of the *Martinez* issue  
 11 until the petition is fully briefed on the merits. (ECF No. 35 at 16-17.) Respondents agree.  
 12 (ECF No. 40 at 4.) The Court will follow that procedure.

### 13 **C. THE COURT GRANTS LEAVE TO FILE EXHIBIT UNDER SEAL**

14 Petitioner's motion for leave to file exhibit under seal asks the Court to seal a  
 15 portion of the preliminary hearing transcript that also was sealed in the state district court.  
 16 This part of the preliminary hearing was held outside the presence of the prosecutor and  
 17 contains confidential information. The Court finds compelling reasons to file this document  
 18 under seal, and the Court grants Petitioner's motion. See *Kamakana v. City & Cty. of*  
 19 *Honolulu*, 447 F.3d 1172 (9th Cir. 2006).

### 20 **V. CONCLUSION**

21 It is therefore ordered that Respondents' motion to dismiss (ECF No. 26) is granted  
 22 in part. Ground 2 is exhausted. Ground 3 is unexhausted but is technically exhausted  
 23 because it would be procedurally barred by the state courts.

24 It is further ordered that the Court defers consideration of whether Petitioner can  
 25 demonstrate cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012) to overcome  
 26 the procedural default of Ground 3 until after the filing of an answer and reply in this  
 27 action.

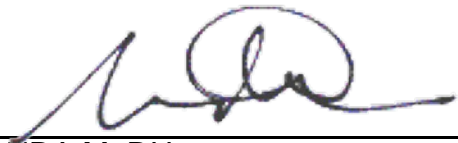
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1 It is further ordered that, within 60 days of entry of this order, Respondents must  
2 file an answer addressing all claims in the amended petition on the merits, under a *de*  
3 *novo* standard of review as to Ground 3, and also addressing whether Ground 3 is barred  
4 by procedural default under federal law.

5 It is further ordered that Petitioner will have 30 days from service of the answer  
6 within which to file a reply.

7 It is further ordered that Petitioner's motion for leave to file exhibit under seal (ECF  
8 No. 38) is granted.

9 DATED THIS 22<sup>nd</sup> Day of March 2021.

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14 MIRANDA M. DU  
15 CHIEF UNITED STATES DISTRICT JUDGE  
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